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No. 91-1806

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ALLIED MUTUAL INSURANCE COMPANY,

Petitioner,

v.

NORTHERN INSURANCE CO. OF NEW YORK,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

A. RICHARD DYKSTRA *
STAFFORD FREY COOPER & STEWART
500 Watermark Tower
88 Spring Street
Seattle, Washington 98104
(206) 623-9900

CHRISTOPHER ALAN RYCEWICZ
STAFFORD FREY COOPER & STEWART
1700 Benjamin Franklin Plaza
One SW Columbia
Portland, Oregon 97258
(503) 221-0699

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Petitioner Allied Mutual Insurance Company ("Allied") may argue for the first time before this Court that it was denied substantive due process by the application of California law to the determination that Allied failed to fulfill its duty of defense where Allied never raised below a due process challenge but asserted only that Washington state's choice-of-law rules required the application of Washington, rather than California law.

2. Whether Allied raises a conflict between the Circuits requiring resolution by this Court where the Ninth Circuit in this case concluded as a matter of state common law, rather than federal law, that the right to a defense under Allied's policy for occurrences taking place before the sale of the named insureds assets transferred by operation of law to the successor corporation which purchased substantially all of the named insured's assets.

LIST OF PARTIES

Northern Insurance Co. of New York ("Northern") was the Plaintiff and Appellee-Cross-Appellant below and is the Respondent before this Court. The Zurich Insurance Company owns the Zurich Holding Company of America, Inc. and the Zurich Insurance Company, U.S. Branch. The Zurich Holding Company of America, Inc. and the Zurich Insurance Company, U.S. Branch, are joint parent companies of the Maryland Casualty Company. Northern, Assurance Company of America, and Valiant Insurance Company are wholly-owned subsidiaries of the Maryland Casualty Company.

Allied was the defendant and Appellant and Cross-Appellee below and is the Petition before this Court. Allied owns stock in and has a joint pooling agreement with Allied Group, Inc., which is a holding company.

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ALLIED MUTUAL INSURANCE COMPANY,

Petitioner,

v.

NORTHERN INSURANCE CO. OF NEW YORK,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Respondent Northern respectfully requests that this Court refuse to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") filed on February 7, 1992.

OPINIONS BELOW

The Opinion of the Ninth Circuit is included in Petitioner's Appendix[1] "A." The unpublished opinions of the

[1] Hereafter "Pet. App."

United States District Court for the Western District of Washington (the "District Court") are included at Pet. App. "B" and "C."

JURISDICTION

The Opinion of the Ninth Circuit was filed on February 7, 1992. Petitioner's motion to stay issuance of the mandate was denied by Order filed March 4, 1992. The mandate issued on March 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION AND STATUTE

The relevant constitutional provision and statute are set forth at Pet. App. "D" and "F."

STATEMENT OF THE CASE[2]

1. Statement of Facts.

This case involves a dispute over attorney fees incurred by Northern in defending a product liability lawsuit (the "*Howard* lawsuit"). The *Howard* plaintiff sued several manufacturers of alcoholic beverages, including

[2] Because Allied's Statement of the Case is incomplete and does not discuss all matters necessary for a full understanding of this case, Northern includes this supplemental Statement in this Brief.

California Cooler, Inc. ("CCI"), California Cooler Company ("CCC"), Brown-Forman Corporation ("BFC") and California Cooler Incorporated Liquidation Corporation ("CLC") for failing to warn of dangers associated with consumption of alcohol during pregnancy after his child was born on October 2, 1983 with fetal alcohol syndrome. Allied provided liability insurance coverage to CCI to September 20, 1983, and Northern provided liability coverage to CCI from September 20, 1983 to September 20, 1985.

In July of 1985 – approximately two years after the birth of Howard's allegedly injured child and two years before the *Howard* plaintiff filed suit – BFC purchased substantially all of the assets of CCI. CCI then changed its name to CLC (the so-called "old CCI") and ceased operations. BFC manufactured the California Cooler product through an unincorporated division (CCC). Jojole Corp. became the so-called "new CCI," which does not manufacture California Coolers.

When BFC received the *Howard* original complaint in November of 1987, it selected and retained the Preston firm to provide a defense, and then tendered the defense to Northern. Even though the original *Howard* complaint named CCC (which was not Northern's named insured)[3]

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[3] Allied ignores that the Declarations page of Allied's policy has CCC written in as a named insured. (ER 7) This page was offered as an exhibit to the District Court by Allied. (CR 6, Ex. "A") "ER" refers to the Excerpts of Record filed in the Ninth Circuit. "CR" refers to the Clerk's Record in the District Court.

as a defendant and not CCI or BFC, Northern acknowledged its defense obligation to BFC because both California and Washington (as well as numerous other jurisdictions) recognized that a successor corporation like BFC, in the circumstances of the *Howard* lawsuit, assumed the liability of its predecessor, CCI.[4]

After Northern accepted the tender of defense from BFC, it advised BFC that it would be retaining the Lane firm to provide a defense because the Preston firm was not on its approved list of counsel. Northern acquiesced in BFC's insistence that the Preston firm provide the defense, and Northern and BFC agreed upon a fee-splitting agreement since the Preston firm charged higher rates than the Lane firm.[5]

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[4] After CCC filed motions to dismiss the claims against CCC and quash service as to CCI, which had been served but not named as a party in the original complaint, the *Howard* plaintiff filed an amended complaint in which he named as defendants, among others, CCI, BFC, and CLC. The *Howard* court denied the motions and ruled that CCI had been served (contrary to the assertion of Allied [Pet. at 3]) and that the *Howard* plaintiff, under the doctrine of corporate successor liability, stated a valid claim against CCC and its parent, BFC. The *Howard* plaintiff then filed a second amended complaint naming only BFC (of the relevant parties) and asserted that BFC was the "successor in interest" to the company that manufactured the California Cooler product in 1983.

[5] There is no support for Allied's contention (Pet. at 3) that the "Preston law firm defended only BFC and New CCI and did not provide a defense to Old CCI." Based on the broad allegations of the *Howard* complaints and the *Howard* court's express recognition of the doctrine of corporate successor liability, the defense provided by the Preston firm benefitted BFC and all associated corporations including the so-called "Old CCI."

In February of 1988, Northern learned that Allied had insured CCI for the period of time preceding the issuance of the Northern policy and tendered the defense of the *Howard* lawsuit to Allied. Before Allied responded, BFC directly tendered the defense of the *Howard* lawsuit to Allied in March of 1988. Allied acknowledged its defense obligation and reserved its rights but refused to share in the cost of BFC's selected counsel, the Preston firm. Instead, it hired the Betts firm, which it controlled, to provide a defense. Allied was concerned that the Preston firm, even though selected and controlled by BFC, and not Northern, might "owe some allegiance" to Northern and somehow "lead the evidence" in Northern's favor. (ER 74)

BFC objected but eventually acquiesced in allowing the Betts firm, along with its selected counsel (the Preston firm) to conduct the defense. BFC did not waive the right under the Allied policy or California law to have Allied reimburse it for defense costs and expenses incurred by the Preston firm. The *Howard* lawsuit eventually was voluntarily dismissed without any determination of liability or damages.

2. Proceedings in the District Court.

Northern filed this lawsuit in the District Court (under diversity jurisdiction) and sought from Allied equitable contribution for approximately 95% of the defense costs incurred in providing a defense.[6] Allied

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[6] Northern also sought a declaration that Allied was obligated to provide indemnity in the event the *Howard* plaintiff prevailed. When the *Howard* lawsuit was dismissed, that issue became moot.

moved for summary judgment and alleged that a fetus is not a person for purposes of insurance coverage of bodily injury. Because California has the most significant relationship to the insurance transaction and Allied policy, the District Court applied California law and denied Allied's motion. (Pet. App. B-3)[7]

Both Northern and Allied then filed Partial Cross-Motions for Summary Judgment. Northern (1) asserted that Allied had a duty to provide a defense in the *Howard* lawsuit because CCI's rights under the Allied policy for occurrences alleged to have taken place before BFC's purchase of CCI's assets were transferred to BFC by assignment and operation of law; (2) asserted that California law applied and, under California law, Allied did not discharge its duty of defense in refusing to retain BFC's selected counsel and instead hiring another law firm; and (3) sought equitable contribution from Allied for defense costs and attorney fees incurred in providing a defense in the *Howard* lawsuit.

Allied asserted (1) Washington law applied and, under Washington law, Allied had no duty of defense or, if it had such a duty, it discharged it and therefore owed no contribution to Northern for the defense costs and expenses Northern incurred in retaining the Preston firm; and in the alternative (2) Northern had no right to contribution for defense costs incurred prior to the tender of

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[7] Allied did not appeal from that Order.

defense to Allied. (Pet. App. B-2) Allied never contended that it would be deprived of due process through application of California law. It merely asserted that, under Washington's choice-of-law rules, Washington law should apply. Allied never raised any issues involving federal substantive law.

The District Court substantially granted Northern's Motion, denied Allied's Motion, and ruled in pertinent part: (1) because BFC was the product line successor of CCI and bore potential liability for pre-sale occurrences, Allied's obligations to CCI under its policy for pre-sale occurrences was transferred to BFC by operation of law; (2) California law applied in determining whether Allied discharged its defense obligation; and (3) because Allied had a conflict of interest with CCI, Allied did not discharge its duty of defense by refusing to retain BFC's selected counsel, the Preston firm, and instead hiring the Betts firm over the objection of BFC. The Court ordered the issue of how defense costs should be apportioned between Northern and Allied determined through mandatory arbitration under Cal. Civ. Code § 2860(c).

3. Proceedings in the Court of Appeals.

Allied appealed to the Ninth Circuit. Allied argued that the District Court erred in granting Northern's Motion for Partial Summary Judgment and ruling that, even though BFC could be found liable to the *Howard* plaintiff under the doctrine of successor liability, Allied's duty to defend could not be transferred by operation of law to BFC from CCI without Allied's consent. Allied also argued that the District Court erred in ruling under

Washington state's "most significant relationship" test that California law applied in determining whether Allied fulfilled its duty of defense by hiring the Betts firm to conduct a defense in the *Howard* lawsuit over the objections of BFC. Allied never raised a constitutional challenge to the District Court's decision under Washington's choice-of-law rules that California law applied in measuring whether Allied satisfied its duty of defense. Nor did Allied raise any argument under federal substantive law. As before the District Court, Allied's substantive arguments raised issues of state law.

On February 7, 1992, the Ninth Circuit issued its Opinion in favor of Northern. The Ninth Circuit ruled, as a matter of California law, that the benefits of Allied's policy, including the right to a defense for pre-sale occurrences, transferred by operation of law to BFC when BFC purchased substantially all of CCI's assets. The Ninth Circuit cited and followed the reasoning of the Eighth Circuit in *Ocean Accident & Guar. Corp. v. Southwestern Bell Tel. Co.*, 100 F.2d 441 (8th Cir.), *cert. den.* 306 U.S. 658 (1939) (*"Ocean Accident"*), which applied Missouri law.

The Ninth Circuit also ruled that the District Court correctly applied Washington's choice-of-law rules and properly ruled that Allied failed to satisfy its defense obligation by hiring the Betts firm because, under California law, BFC had the right to select and insist that it be represented exclusively by its own counsel, the Preston firm.

The Ninth Circuit expressly rejected Allied's contention, which Allied reiterates in its Petition (at 6-12), that the question whether it satisfied its duty to provide a defense involved the "ethical duties" of a Washington

attorney in a Washington court. The Ninth Circuit correctly characterized the issue as whether Allied satisfied its defense obligation to its insured by insisting on retaining counsel it selected and controlled to represent its insured where a conflict of interest existed:

> "The underlying concern is not, however, the enforcement of ethical rules, but rather the protection of the insured when its interests conflict with those of its insurer."

(Pet. App. A-14)

Allied filed a motion in the Ninth Circuit for an order to stay issuance of the mandate. Northern opposed the motion and on March 4, 1992, the Ninth Circuit issued the mandate.

REASONS FOR DENYING THE WRIT

I.

Allied may not argue for the first time before this Court that it was denied due process by the application of California law to the determination that it failed to fulfill its defense obligation. Allied never raised below a constitutional choice-of-law argument but asserted only that Washington's choice-of-law rules required the application of Washington, rather than California law. The Ninth Circuit correctly recognized that the question whether Allied satisfied its duty to defend does not involve the enforcement of an attorney's ethical duties. The Ninth Circuit's decision in this case involves state, not federal law and does not conflict with decisions of this Court.

This Court should deny the Writ of Certiorari sought by Allied. Allied contends for the first time before this Court that the lower Courts' application of California law

deprived Allied of a property interest without due process of law. Allied failed to raise a constitutional choice-of-law challenge to the application of California law in either the District Court or the Ninth Circuit. Rather, Allied argued only that under the forum state's (Washington) choice-of-law analysis, Washington law should apply. Allied may not assert for the first time before this Court that it was somehow denied due process.

Allied mischaracterizes the issue whether it satisfied its defense obligation in refusing to surrender control of the *Howard* litigation as relating to whether the Betts firm fulfilled its "ethical duties" to Allied's insureds. (Pet. at 6) As correctly recognized by the Ninth Circuit (Pet. App. A-14), the "underlying concern is not, however, the enforcement of ethical rules, but rather the protection of the insured when its interests conflict with those of its insurer." This distinction is well recognized under California law. *See San Diego Federal Credit Union v. Cumis Ins. Society, Inc.*, 208 Cal. Rptr. 494, 162 Cal. App. 3d 358, 373-74 (1984) ("*Cumis*").

Allied also contends that the Ninth Circuit's decision to apply California law conflicts with decisions of this Court. The Ninth Circuit's decision in this case involved the application of California law under Washington's choice-of-law rules. In short, it exclusively involved issues of state rather than federal law. The decisions Allied relies upon involved federal law. Thus, no conflict exists. Moreover, the Ninth Circuit correctly applied California law.

Allied does not, and indeed cannot, contend that it raised in either the District Court or the Ninth Circuit a

constitutionally based choice-of-law challenge to the application of California law. Allied contended only that, under Washington's "most significant relationship" test to resolving choice-of-law issues, Washington rather than California law should apply. *See Dairyland Ins. v. State Farm Mut. Auto. Ins.*, 701 P.2d 806, 808 (Wash. App.), *rev. den.* 104 Wash. 2d 1016 (1985).

It is well recognized that where a petitioner has failed to present a due process challenge in the district court or court of appeals, thereby leaving a void in the record on the due process point, this Court will refuse to consider the petitioner's due process argument. *See e.g., G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412, n. 7, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982) ("because petitioner did not present [the argument that New Jersey law violates due process] to the Court of Appeals, we do not address it"); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 2921, n. 23, 106 L.Ed.2d 219 (1989) (in the absence of a developed record on the issues relevant to the due process argument raised for the first time before the Supreme Court, the Court refused to consider the due process challenge). Accordingly, Allied has failed to preserve any due process challenge to the lower Courts' application of California law.

Moreover, the decision of the Ninth Circuit in this case is not, as erroneously contended by Allied, in conflict with decisions of this Court. The decision of the Ninth Circuit does not involve the application of federal law. Rather, the Ninth Circuit applied Washington's choice-of-law rules and concluded that California had the "most significant relationship" with the parties and the

contract. Therefore, California law applied. (Pet. App. A-12-14)

The decisions on which Allied relies in support of its erroneous contention that the application of California law deprived it of property without due process are distinguishable. They directly involved federal constitutional law. The courts squarely addressed the insurers' contentions, which were asserted in the first instance below, that the application of forum law violated due process. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) ("*Allstate*"); *Home Ins. Co. v. Dick*, 281 U.S. 397, 405, 50 S.Ct. 338, 74 L.Ed. 926 (1930) ("*Home*").

The principal purpose for which this Court grants certiorari is to resolve conflicts among circuits and state courts regarding questions of federal law. *See Braxton v. United States*, ___ U.S. ___, 111 S.Ct. 1854, 1857, 114 L.Ed.2d 385 (1991). Since the Ninth Circuit's decision in this case involves state, not federal law, it is not in conflict with decisions of this Court.

Even if Allied had raised and preserved a due process challenge, Allied was not denied due process because the Ninth Circuit correctly applied California law. In *Home*, this Court concluded that the presence of one non-significant forum contact, the nominal residence of the plaintiff in the forum state, standing alone was inadequate to pass constitutional choice-of-law muster. 281 U.S. at 408; *see Allstate*, 449 U.S. at 309-311.

This case is in marked contrast with *Home*. Here, the District Court and the Ninth Circuit correctly concluded that California had the "most significant relationship" to

the contract and the parties. California was the place of contracting, the place of negotiation of the contract, the location of the subject matter of the contract, and the domicile and residence of the insureds and Allied's agent. (Pet. App. A-13-14) California clearly had an interest in the case. Under these circumstances, the Ninth Circuit correctly concluded, under Washington's choice-of-law rules, that California law applied. This conclusion clearly satisfies the requirements of due process.

Allied continues to argue, as it erroneously argued below, that the issue whether it fulfilled its duty to defend somehow involves the ethical duties owed by the Betts firm to the insured. The Ninth Circuit expressly rejected this contention:

> "The underlying concern is not, however, the enforcement of ethical rules, but rather the protection of the insured when its interests conflict with those of its insurer."

(Pet. App. A-14) While the *Cumis* court's decision properly recognizes that a lawyer cannot ethically represent both an insured and an insurer where a conflict exists without the informed consent of all parties, it also recognizes that a lawyer's ethical duties, and an insurer's contractual duties to the insured are distinct. 162 Cal. App. 3d at 373-75.

This distinction is important since this case involves an examination of Allied's performance of its *contractual* obligations, not of the Betts firm's *ethical* obligations, to the insured. It undercuts much of Allied's argument and demonstrates the fallacy of Allied's premise that Washington's interest in regulating the conduct of Washington

attorneys is somehow involved in this case. This case involves the conduct of Allied, not the conduct of the attorneys hired by Allied to represent the insured. The cases upon which Allied relies (Pet. at 9) are therefore inapposite. *Cf. Sperry v. Florida*, 373 U.S. 379, 381-84, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963) (Florida has a substantial interest in ensuring that only attorneys licensed by the state may practice law within the state's borders); *Middlesex County Ethics Committee v. Garden, etc.*, 457 U.S. 423, 432-33, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (the federal courts should abstain from interfering with ongoing state bar disciplinary proceedings). These decisions involve states' direct regulation of the practice of law within their borders rather than an insurer's performance of its duty to defend as is involved in this case.

Allied failed to preserve a constitutional choice-of-law challenge. The Ninth Circuit correctly concluded that California had the most significant relationship to the parties and the transaction and that the crucial issue involves whether Allied satisfied its duty to defend. The Ninth Circuit's decision involves state, not federal law and does not conflict with decisions of this Court. Accordingly, this Court should refuse to issue a Writ of Certiorari.

II.

Allied fails to raise a conflict between the circuits requiring resolution by this Court where the Ninth Circuit concluded as a matter of state common law that the policy benefits were transferred by operation of law.

No conflict exists between the circuits requiring resolution by this Court. In this case, the Ninth Circuit correctly ruled, as a matter of state law, that the policy benefits were transferred by operation of law. (Pet. App. A-9) One purpose for which this Court grants certiorari is to resolve conflicts among circuits "concerning the meaning of provisions of federal law." *Braxton v. United States, supra,* 111 S.Ct. at 1857. No such conflict exists in this case. Certiorari is inappropriate for this reason alone.

Moreover, the decision of the Ninth Circuit is correct. The Ninth Circuit correctly recognized that both California and Washington apply the doctrine of product line successor liability under which a purchaser of substantially all assets of a firm assumes liability for product liability claims arising from the seller's pre-sale activities; this liability is transferred regardless of any clause to the contrary in an asset purchase agreement. [Pet. App. A-9, *citing Martin v. Abbott Laboratories,* 689 P.2d 368, 384 (Wash. 1984); *Ray v. Alad Corp.*, 560 P.2d 3, 11 (Cal. 1977)].

The Ninth Circuit properly recognized that the right under Allied's policy to a defense for pre-sale liability was transferred to BFC as a matter of law despite the no-assignment clause of the Allied policy because "the rationale for honoring 'no-assignment' clauses vanishes when liability arises from presale activity." (Pet. App. A-10) The Ninth Circuit aptly recognized that the purpose of "no-

assignment" clauses in insurance policies is protection against unforeseen increases in risk brought about by a change in the nature of a new insured. (*Id.*) But when a loss occurs before a transfer of assets, "the characteristics of the successor are of little importance; regardless of any transfer the insurer still covers only the risk it evaluated when it wrote the policy." (Pet. App. A-10-11)[8]

The decisions upon which Allied relies are inapposite. *Independent Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 654 F. Supp. 1334, 1347 (D.D.C. 1986), *aff'd in part, rev'd in part sub nom Indept. Petrochemical v. Aetna Cas. & Sur. Co.*, 944 F.2d 940, 948 (D.C. Cir. 1991), *cert. den.* 112 S.Ct. 1777 (1992) (Pet. at 14) involved the application of state, not federal law. Moreover, in contrast to this case, the alleged occurrence – the spraying of dioxin-contaminated oil by an agent of the named insured – did not take place until "six weeks after the sale" of the named insured's stock to a third party. 654 F. Supp. at 1347. Therefore, that case did not involve, as is involved here, defense of a lawsuit alleging a pre-sale occurrence. There is no conflict.

Allied cites a number of decisions (Pet. at 13-14) purportedly standing for the proposition that "the rule followed in other circuits and in Washington and California is that a simple sale of assets covered by the insurance contract" does not transfer the benefits of the contract

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[8] In ruling that the right to a defense under the Allied policy was transferred as a matter of law for pre-sale occurrences, the Court of Appeals relied on a decision of the Eighth Circuit, which applied Missouri law. *See Ocean Accident, supra.*

without an express consensual assignment. Those decisions are inapposite; not one of them involves the transfer of a duty to defend under a liability policy for pre-sale occurrences. *See Byrd v. American Guarantee & Liability Ins. Co.*, 180 F.2d 246, 248-49 (4th Cir. 1950) (automobile liability policy did not provide coverage to the buyer of an automobile who took title before the accident); *Newark Fire Ins. Co. v. Turk*, 6 F.2d 533, 534 (3d Cir. 1925) (policy of fire insurance is personal contract insuring owner of property, rather than property itself); *Davis v. Oregon Mutual Insurance Company*, 71 Wash. 2d 579, 429 P.2d 886, 887 (1967) (same as *Newark*); *Alexander v. Security-First Nat. Bank of Los Angeles*, 7 Cal.2d 718, 62 P.2d 735, 737 (1936) (neither lessor nor lessee had an interest in proceeds of property insurance obtained by the other on a separate insurable interest).

Because the Ninth Circuit's decision in this case applied state, rather than federal law, and because no conflict exists between the circuits requiring resolution by this Court, this Court should refuse to issue a Writ of Certiorari.

CONCLUSION

For the above reasons, this Court should refuse to issue a Writ of Certiorari in this case.

Dated: June 5, 1992.

Respectfully submitted,

STAFFORD FREY COOPER & STEWART

A. RICHARD DYKSTRA *
CHRISTOPHER ALAN RYCEWICZ

Attorneys for Respondent
Northern Insurance Co. of New York

* Counsel of Record